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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

FONAR CORPORATION AND DR. RAYMOND DAMADIAN,

Petitioners,

—v.—

JOHNSON & JOHNSON AND TECHNICARE CORPORATION,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505 (1986) 1, 2, 3

Wilkerson v. McCarthy, 336 U.S. 53 (1949)..... 2, 3

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PETITIONERS' REPLY BRIEF

This Reply Brief addresses the three arguments raised by Respondents in their Brief in Opposition. None of them is persuasive: *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), supports the reasons for granting the writ in this case; the questions presented were raised and preserved below; and the conclusion of the courts below that there is "no evidence" to support Petitioners' infringement claim incomprehensibly flies in the face of the record.

1. Respondents assert that *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505 (1986), establishes the standard to be followed in this case, and that both courts below followed that standard.[1] In fact, the *Anderson* opinion mirrors the same disharmony and uncertainty regarding judicial methodology in passing upon summary judgment motions as appear in the

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1 *Anderson* involved a motion for summary judgment. The parties and the Court agree that the standard to be employed by trial courts in passing upon motions for summary judgment, directed verdicts, and judgment NOV are essentially identical. *Anderson v. Liberty Lobby*, 106 S.Ct. at 2511. At the same time, the standard must respect the Seventh Amendment's guarantee of trial by jury in each case.

decisions concerning motions for directed verdict and judgment NOV, which are addressed in the Petition.

The *Anderson* opinion contains a series of generalities regarding the trial court's responsibility in passing on summary judgment motions. It says that such motions must be denied "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" (106 S.Ct. at 2510); "If reasonable minds could differ as to the import of the evidence" (*Id.* at 2511); and if "the evidence presents a sufficient disagreement to require submission to a jury. . ." (*Id.* at 2512).

Nowhere, however, does the opinion instruct trial judges in the specific method by which they are to implement the quoted generalities. Rather, where the opinion moves beyond generalities, its message reflects the same conflicts which are described in the Petition for Certiorari.

Thus, immediately following the quotation above that summary judgment must be denied if "reasonable minds could differ as to the import of the evidence," the opinion cites *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), without elaboration. As emphasized in the Petition, *Wilkerson* holds that in passing on a motion for a directed verdict, trial courts are to consider only the evidence which tends to support the case of the non-moving party. Several pages later, in warning against denigration of the role of the jury in ruling on summary judgment motions, the *Anderson* opinion states that "the evidence of the non-moving party is to be believed, and all justifiable inferences are to be drawn in his favor" (106 S.Ct. at 2513). Nowhere, however, does the opinion say that the moving party's evidence must be disregarded, or that the court may rely upon moving party evidence if it is uncontradicted, or that the court may rely upon some contradicted moving party evidence if, for example, the non-moving party has submitted only weak evidence on a material issue. Consequently, *Anderson* can be read as allowing the trial court to rely in some circumstances upon moving party evidence in granting summary judgment, but it does not say when or how. But that

implication flies in the face of the contrary implication raised by citation of *Wilkerson v. McCarthy*.

Justice Brennan in dissent recognized that the opinion sent these "conflicting signals." Referring to the Court's generalities, he asked, "how does a judge assess how one-sided evidence is, or what a 'fair-minded' jury could 'reasonably' decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts" (106 S.Ct. at 2519).

The Court can resolve the mysteries by granting certiorari in this case.

On one issue, however, *Anderson* is absolutely clear. In jury cases, trial judges may not weigh conflicting evidence and may not determine credibility in deciding motions for summary judgment or a directed verdict (*Id.* at 2511, 2513). Not all the Circuits agree. See Petition for Certiorari, 14-15. Certainly, the courts below do not agree, for they both based their decisions on Respondents' unfavorable contradicted evidence. See Petition for Certiorari, 16-19.

2. Respondents argue that Petitioners have shifted ground in now asserting that the courts below improperly looked to all the evidence in passing on Respondents' NOV motion. The claim is totally inaccurate, as the record below establishes. Petitioners explicitly pressed upon the courts below the same questions as are presented in the Petition.

The basis of Petitioners' argument in the Court of Appeals was that, in granting the motion for judgment NOV, the district court erroneously relied upon contradicted unfavorable evidence rather than simply deciding whether there was sufficient favorable evidence to support the verdict. In its Appeal Brief at p. 37, Petitioners argued:

> Whatever defendants' evidence on this issue may have been, it was legally of no consequence on defendants' motion for JNOV since the focus of such motion should

have been on the existence of evidence which could support the verdict of infringement.

At page 3, Petitioners stated that "in deciding the motion for JNOV, the District Court's duty was to search the record to ascertain if substantial evidence *supported* the jury's verdict" (emphasis added). At page 21, Petitioners stated that "in failing to recognize the existence of a factual dispute over the meaning and interpretation to be given to this term ['standard']," the District Court was "invading the province of the jury." At page 26, Petitioners stated that "instead of simply examining the record to ascertain whether facts had been proven to support plaintiffs' charge of infringement . . . the District Court impermissibly and inexplicably invaded the province of the jury and made its own factual determinations." At page 27, Petitioners stated that "[T]he District Court's opinion reflects no effort to ascertain whether facts in the record exist to support the finding of infringement—which is all the District Court should have done in deciding defendants' motion for JNOV."[2]

Similarly, in their district court brief opposing the motion for judgment NOV, Petitioners argued that, to prevail, Respondents must show that "the plaintiffs have not presented adequate evidence in support of the jury's findings and verdict" (p. 8), that Respondents' reliance on their own evidence was "improper in the context of the present motion" (p. 9, n. 5), that the Respondents were inappropriately "attempting to present evidence to the Court *solely with respect to their own position*" (p. 10) (emphasis in original), and that Respondents' burden was to show that Petitioners had not provided "ample evidence" to establish infringement (p. 51).

It is clear, therefore, that Petitioners repeatedly asserted below that, if the courts were to consider all the evidence, they could do so only for the purpose of finding evidence to support the claim of infringement. They also asserted that "defendants'

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2 Other similar assertions appear at pp. 29, 30, 38 and 42-43 of Petitioners' brief in the Federal Circuit.

evidence . . . was legally of no consequence," which is but another way of stating that the courts could only consider Petitioners' evidence. Thus the questions presented in the Petition were presented below.

3. Respondents argue that this is not an appropriate case in which to resolve the conflict in the Circuits because Petitioners would not be entitled to relief under any of the conflicting standards, since both courts below concluded that there was "no evidence" in the record to support Petitioners' infringement claim. The argument has no merit because the "no evidence" conclusion below is itself incomprehensible in light of the record which contains substantial evidence that Respondents' equipment infringed each step of claim 1 of the patent.

Petitioners called as witnesses numerous medical doctors who used Respondents' equipment. Their testimony related to the methods employed in using that equipment, and fully supported Petitioners' contentions of infringement. For example, Dr. Robert Lufkin testified as follows (JA. 779a):

> Q. And again let me turn the question around. If you're using the Technicare Teslacon equipment which happens to produce an image, are you, nonetheless still performing the same operative steps that are set forth in [claim 1]?
>
> A. Yes.

Dr. Lufkin specifically testified that each of the three steps of claim 1 were practiced by users of Respondents' equipment. The first step of claim 1 is to measure and establish standard values for T_1 and T_2 in cancerous and normal tissue. After explaining that NMR images or scans are simply visual translations of intensity values made up of T_1 and T_2 relaxation times (JA. 457a-460a),[3] Dr. Lufkin testified (JA. 467a):

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[3] The complete dependence of imagery upon relaxation times is described in the Petition for Certiorari, 5-6.

(footnote continued on next page)

> . . . one is exposed to many images, many NMR images or normal structures throughout the body and all different scanning planes till a familiarity of the normal appearance of structures is obtained. After that, then one is exposed to an assortment of pathological processes as they appear on NMR images. And then from this library of normal and abnormal scans that you either physically have in your mind or carry around with you in your office, then you can apply this to an unknown scan. . . .

Similar testimony describing the establishment of standards was given by Dr. Thomas Brady, another of Petitioners' witnesses who testified as a user of Respondents' equipment (JA. 397a-398a):

> A. Early on in the early on steps you do the normals to define normalcy. then you take patients with known disease so you can define what known disease looks like. Then you can apply it to patients with unknown or suspected diseases.
>
> Q. You mentioned early on you had to do first the normals then the known disease.
>
> A. Right.
>
> Q. After that you were then in a position to do unknowns and determine where they fall?
>
> A. Yes.

(footnote continued from previous page)

It is specifically the elevated relaxation times of cancerous tissue that generates the image allowing detection. But for those elevated relaxation times, detection of cancerous tissue would be impossible.

The statement in Respondents' Brief in Opposition (p. 10 note) that "no technology exists for an NMR (or any other) scan to detect cancer" is untrue. Respondents' own press releases stated that their NMR equipment "has been used successfully in the diagnosis of . . . various cancers" (JE 411).

With respect to the second step of claim 1, measuring T_1 and T_2 for suspect tissue, Dr. Lufkin testified (JA. 586a):

> Q. Okay. Now, in using the NMR apparatus of Technicare, would somebody be measuring the NMR spin-lattice relaxation times and spin-spin relaxation times of the suspected tissue?
>
> A. Yes. The spin-lattice relaxation time, or T_1, and spin-spin relaxation time, or T_2, as it's known, is contained in every intensity value displayed on the screen.
>
> Q. And in doing that, would he be looking at the suspected tissue to determine the extent of the deviant behavior?
>
> A. That's correct.

With respect to the third step of claim 1, comparing the values for the suspect tissue with standards for healthy and cancerous tissue, Dr. Lufkin testified (JA. 566a-567a):

> Q. Would a person using the Teslacon equipment, the Technicare Teslacon equipment, then be comparing the values obtained, during [the second] step when it's displayed with predetermined like values for normal and cancerous tissue?
>
> A. Yes. In looking at the image, you look at the lesion of abnormality—or the area of abnormality and compare it in one case to immediately adjacent normal tissue of the same organ; or one more step removed in your own mind, you may compare the images or even directly side by side with normal patients of the same age and same sex scanned also with NMR.
>
> Q. All right. That would be comparing it to norms.
>
> A. Mm-hm.
>
> Q. How about comparing it for cancerous tissues, like values for cancerous tissues?

A. In that case you would compare a given lesion seen on the scan with maybe a patient with a similar lesion, a different patient with a very similar appearing lesion that you had seen the day before or in the past somewhere at another time.

Thus, Petitioners affirmatively introduced evidence to show infringement by Respondents of each of the three steps of claim 1 of the patent, and the "no evidence" conclusion by the courts below simply misrepresents the record. As we pointed out in the Petition (pp. 16-19), the conclusion by the courts below that there was "no evidence", grows out of their reliance upon unfavorable contradicted evidence. The courts must necessarily have believed that, in totality, the proof favored the Respondents. But if they had said so, they would have had to disclose that they had weighed conflicting evidence and determined credibility, and had therefore offended the Seventh Amendment.

Because the outcome of this case depends entirely upon the standard applied in reviewing the evidence, it is the appropriate case in which to resolve the stark conflict among the Circuit Courts involving an important question of federal procedure.[4]

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4 Respondents concede the existence of the conflict. See Brief in Opposition, 19 note.

CONCLUSION

For the reasons stated above, certiorari should be granted.

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